REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CHINA BANKING CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5433

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

OCT 07 1998

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D E C I S I O N

Before Us is a claim for refund or issuance of tax credit certificate representing gross receipts taxes alleged to have been paid erroneously by petitioner for the period covering the 3rd quarter of 1994 to the 4th quarter of 1995 in the aggregate amount of P8,754,346.16 plus interest at the legal rate from date of payment until fully paid.

Petitioner is a universal banking institution duly organized and existing by virtue of the laws of the Philippines. During the period covered in this case, petitioner earned/derived income on interest on loans investments, commissions, service & collection charges, foreign exchange profit and other operating earnings.

On different occasions from October 20, 1994 up to January 22, 1996, inclusive, petitioner paid the amount representing the 5% gross receipts tax on income earned/derived by petitioner for taxable 3rd quarter 1994 up to the 4th

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quarter of 1995 as evidenced by its Quarterly Percentage Tax Returns (Exhs. "A" to "A5", "F" to "F5").

For the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995, petitioner paid the total amount of P112,638,409.98 representing the 5% Gross Receipts Tax (GRT) on all receipts earned/derived by the petitioner which allegedly included the 20% final withholding tax on its interest income, computed as follows:

Exhibit	Period Covered	Date Filed and Paid	Gross Receipts Tax Paid
	1994		
"A"	3rd Quarter	10-20-94	P14,191,991.66
"A1"	4th Quarter	01-20-95	21,414,725.47
	1995		
"A2"	1st Quarter	04-20-95	19,674,682.63
"A3"	2nd Quarter	07-20-95	15,191,735.90
"A4"	3rd Quarter	10-20-95	22,794,053.96
"A5"	4th Quarter	01-22-96	19,371,220.36
			P112,638,409.98

On January 30, 1996, this Court rendered a decision in the case of ***Asian Banking Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720***, ruling that the 20% final tax on interest income withheld from the bank should not form part of its taxable gross receipts for GRT purposes. On account of the said Decision, petitioner filed its amended Quarterly Percentage Tax Returns for the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "F" to "F5") reflecting a refundable total amount of P8,754,346.16 computed as follows:

	Corrected GRT	GRT Paid	Refundable Amount
1994			
3rd Quarter	P14,084,351.44	P14,191,991.67	P 107,640.23
4th Quarter	19,021,546.55	21,414,725.46	2,393,178.92
1995			
1st Quarter	17,819,477.48	19,674,682.63	1,855,205.15
2nd Quarter	14,550,861.93	15,191,735.90	640,873.97
3rd Quarter	20,445,711.76	22,794,053.96	2,348,342.20
4th Quarter	17,962,114.67	19,371,220.36	1,409,105.69
			P 8,754,346.16

On October 16, 1996, petitioner filed its formal claim for refund and/or tax credit (Exh. "G") of gross receipts taxes allegedly paid erroneously by petitioner covering the period from the 3rd quarter of 1994 up to the 4th quarter of 1995 in the aggregate amount of P8,754,346.16. Thereafter, on October 18, 1996, without waiting for the decision of the Commissioner of Internal Revenue on the formal claim for refund and/or tax credit, petitioner filed the instant petition for review before this Court lest it be barred by the mandatory two-year prescriptive period under Section 230 of the Tax Code

Respondent, in her Answer to the Petition for Review maintained the following Special and Affirmative defenses:

SPECIAL AND AFFIRMATIVE DEFENSES

5) Petitioner's claim for tax refund/tax credit is still undergoing administrative routinary investigation/examination by respondent's Bureau;

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6) The alleged refundable/creditable gross receipt tax were collected and paid pursuant to law and pertinent BIR implementing rules and regulations, hence, the same is not refundable. Petitioner must prove that the income from which the refundable/creditable taxes were paid from, were declared and included in gross income during the year under review;

7) Petitioner's allegation that it erroneously and excessively paid its gross receipts tax during the year under review does not ipso facto warrant the refund/credit. Petitioner must prove that the exclusions claimed by it from its gross receipts must be an allowable exclusion under the Tax Code and its pertinent implementing rules and regulations. Moreover, it must be supported by evidence.

8) Petitioner must likewise prove that the alleged refundable/creditable gross receipts taxes were neither automatically applied as tax credit against its tax liability for the succeeding quarter/s or of the succeeding taxable year/s;

9) Claims for tax refund/credit are construed in strictissimi juris against the taxpayer as it partakes the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the law. Failure on the part of the petitioner to prove the same is fatal to its claim for tax refund/credit;

10) Moreover, petitioner must prove that it has complied with the provision of Section 230 of the Tax Code, as amended.

During the course of the trial, petitioner presented as evidence the testimonies of its financial officers who identified the documentary evidence it submitted before Us, to wit:

1) Quarterly Percentage Returns for the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "A" to "A5");

2) Daily Earnings and Expenses for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "B" to "B5-7");

3) Computation of Monthly Accrued Gross Receipts Tax of petitioner for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "C", "C1", "C2", "C4", "C4-2", "C5", "C5-2");

4) Schedule of Gross Earnings for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "C-1, "C1-1", C2-2", "C3". "C4-1", "C5-1");

5) Schedule of Accrued Interest Receivable for Gross Receipts Tax Computation for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "C-2", "C1-2", "C2-4", "C3-2");

6) China Banking Corporation's Managers' Checks payable to the Commissioner of Internal Revenue (Exhs. "D", to "D5");

7) Petitioner's Tax Returns/ATAPS Batch Control Sheet (Exhs. "E" to "E5-2);

8) Amended Percentage Tax Returns for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "F" to "F5");

9) Comparative computation of Gross Receipts Tax for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 (Exhs. "F-1" to "F5-1"); and

10) Letter-request for refund, dated October 16, 1996. (Exh. "G").

The sole issue to be resolved in this case is whether or not petitioner is entitled to a refund of the amount of P8,754,346.16 representing gross receipts taxes alleged to have been paid erroneously by petitioner for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995.

Pertinent to the resolution of this case is Section 119 of the Tax Code, to quote:

> "Sec. 119. ***Tax on banks and non-bank financial intermediaries***. - There shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-

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bank financial intermediaries in accordance with the following schedule:

(a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived.

Short-term maturity not in excess of two (2) years	5%
Medium-term maturity - over two years but not exceeding four (4) years	3%
Long-term maturity:	
(i) Over four (4) years but not exceeding seven (7) years	1%
(ii) Over seven (7) years	0%
(b) On dividends	0%

(c) On royalties, rentals of property, real or personal, profits from exchange and all other items treated as gross income under Section 28 of this Code 5%

Provided, however, That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction as short, medium or long term and the correct rate of tax shall be applied accordingly.

Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities."

It is clear from the foregoing section of the Tax Code that gross receipts taxes shall be computed based on all receipts by the bank earned from its lending activities, royalties, rentals, real or personal profits and all other items treated as gross income under Section 28 of the Tax Code. There is no mention whatsoever of the inclusion of the 20% final withholding taxes on the bank's interest income as part of its gross receipts. In fact, the issue of whether or not the gross receipts, for purposes of computing the GRT, shall be computed net of 20% final withholding tax had been settled in the case of ***Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 30, 1996*** , thus:

> "We agree with the petitioner that the 20% final withholding tax on its interest income should not form part of its taxable gross receipts.
>
> **Revenue Regulations No. 12-80** dated Nov. 7, 1980 on taxation of Certain Income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institutions; shall be based on all items of income actually received, thus:
>
> **SEC. 4.** xxx xxx xxx
>
> (e) ***Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities***. - The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of prepayment, then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)
>
> From the foregoing, it is but logical to infer that the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for the purpose of computing the GRT. This conclusion is in accord with the interpretation of the Supreme Court in the case entitled ***Collector of Internal Revenue vs. Manila Jockey Club,***

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108 Phil 821, as quoted by this Court in disposing similar issue in the case entitled ***Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966***, thus:

> "In the second place, the highest tribunal of the land interpreted the term "gross receipts" to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other that the taxpayer. Thus, it was held:
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> > "xx xx. The Government could not have meant to tax as gross receipt of the Manila Jockey Club the ½% which it directs same Club to turn over to the Board of Races. The latter being a Government institution, there would be double taxation, which should be avoided unless the statute admits of no other interpretation. In the same manner, the Government could not have intended to consider as gross receipt the portion of the funds which it directed the Club to give, or know the Club would give, to winning horses and Jockeys - admitted 5%. It is true that the law says that out of the total wager funds 12½% shall be set aside as the `commission' of the track owners but the law itself takes official notice, and virtually approves or directs payment of the portion that goes to owners of horses as prizes and bonuses of jockeys, which portion is admittedly 5% out of the 12½% commission. As it did not at that time contemplate the application of `gross receipts' revenue principle, the law in making a distribution of the total wager funds, took no trouble of separating one item from the other; and for convenience, grouped three items under one common denomination.
> >
> > "Needless to say, gross receipts of the proprietor of the amusement place should not

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> include any money which although delivered to the amusement place has been especially earmarked by law or regulation for some person other than the proprietor." (The Commissioner of Internal Revenue vs. Manila Jockey Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960)
>
> It is to be noted that, under Section 260 of the Tax Code, a race-track is subject to an amusement tax of 20% of its gross receipts and the term `gross receipts' embraces all the receipts of the proprietor, lessee, or operator of the amusement place." Notwithstanding the broad and all-embracing definition of the term "gross receipts" found in our amusement tax law, our Supreme Court did not adopt a literal interpretation of the said term in the case of the Manila Jockey Club, Inc., supra.

We disagree with the contention of the respondent that the cases of Collector of Internal Revenue vs. Manila Jockey Club Inc. and Compania Maritima vs. Acting Commissioner of Internal Revenue in conjunction with Revenue Regulations No. 12-80 are applicable to the case at bar, it appears that the subject matter of said aforecited cases is distinct and different from the subject matter of the present case. In the former cases cited, portions of the race track's gross receipts which were turned over to the Board of Races, a government institution, and to the winning horses and jockeys, were excluded from its gross receipts for the purpose of computing its gross receipts tax (20% amusement taxes) because although delivered to the race track owner, the same had already been earmarked by law or regulation other than the proprietor. On the other hand, the present case involves the subject of 20% final taxes withheld on the bank's interest income which should not form part of petitioner's gross receipts simply because the same were already turned over to the Government by the petitioner as it filed and remitted the 20% final withholding taxes on its interest income. Subjecting the same amount to gross receipts taxes would be tantamount to double taxation which is obviously unfair on the part of the petitioner.

After affirmatively settling the legal issue of whether or not the 20% final withholding taxes should not form part of the gross receipts of the petitioner, We are now tasked to resolve the factual issue as to whether or not petitioner is entitled to the refund/credit sought based on the evidence at hand.

A thorough and careful examination of all the documentary evidence presented by the petitioner reveal that petitioner has failed to substantially prove its entitlement to the refund/credit sought. Even though petitioner in the case at bar had satisfactorily proved through various documentary evidence that it actually paid its gross receipts taxes which was computed based on its gross receipts inclusive of the 20% final withholding tax on the bank's interest income, it however failed to prove that the said 20% final withholding taxes were actually paid and remitted to the Bureau of Internal Revenue, thus entitling the same to be excluded in the computation of petitioner's gross receipts tax. Petitioner is reminded that in the case of ***Asian Bank Corporation (supra)*** from which it based its claim for refund, a disputable presumption exists that the final tax excluded from the computation of gross receipts tax already "went to the coffers of the government", and therefore, should no longer form part of its gross receipts for the purpose of computing the GRT. This Court in deciding on the Asian Bank case sought to avoid the unfavored existence of double taxation. In the instant case, petitioner showed no convincing proof that it suffered from being erroneously taxed twice thus entitling it to the refund sought.

It is our opinion that for the petitioner to substantially prove its entitlement to the refund/credit sought, it should have presented as evidence copies of Certificates of Final Income Tax Withheld issued by its withholding agents, as what it did in its previous case covering its second quarter of 1994 in CTA Case No. 5405, or any proof whatsoever that would show payment of the 20% final withholding tax and which would necessarily justify its exclusion from petitioner's gross receipts.

In view of the principle that tax refunds are in the nature of tax exemptions and as such, they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming the exemption ***(Towa Industry, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 52109, May 13, 1997)***, the taxpayer having the burden of proof to show that it is entitled to the return of the amount claimed as refundable ***(Benguet Corp. vs. Commissioner of Internal Revenue, CTA Case No. 4686, 4829, June 27, 1995)***, this Court has no other recourse but to deny the instant petition.

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WHEREFORE, in the light of all the foregoing, petitioner's claim for issuance of tax credit certificate or refund of gross receipt taxes allegedly paid erroneously by petitioner for the period covering the 3rd quarter of 1994 up to the 4th quarter of 1995 in the aggregate amount of P8,754,346.16 is hereby **DENIED.**

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

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DISSENTING OPINION

In a recently decided case entitled **China Banking Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5405 promulgated on September 30, 1998,** I expressed my disagreement with the legal opinion espoused by my esteemed colleagues which excluded the 20% final withholding tax on certain passive income in the determination of petitioner's gross receipts for purposes of computing the 5% gross receipts tax under Section 119 of the Tax Code.

Inasmuch as the instant petition for review is premised on the same legal theory as that of the aforecited China banking case, let me again register my dissent to the majority opinion even if the conclusion in this case is for the denial of the entire claim because

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this decision still adheres to the doctrine enunciated by this Court in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720** which in my humble view is incorrect.

While it is true, that all passive gross income of corporations which are subject to the final withholding tax at source under Section 50(a) of the Tax Code, as amended by Executive Order No. 37 on July 31, 1986, should no longer form part of the gross income under Section 28(a) of the same Code. However, inasmuch as the enumeration of gross income under the aforestated Section of the Tax Code is global in concept, the corporate income tax shall be computed on the basis of its taxable income consisting of pertinent items of gross income specified in the Tax Code less deductions, if any, authorized by such types of income by said Code or other special laws.

There is no provision in the Tax Code or any special laws which excludes the 20% final income tax withholding under Section 50(a), as no longer forming part of the gross receipts for purpose of the 5% gross receipts tax. On the other hand, Section 8(c) of Revenue Regulations No. 12-80, dated November 7, 1980, as amended by Section 7(c) of Revenue Regulations No. 17-84, dated October 12, 1984 have the same provisions, thus:

"<u>If the recipient of the above-mentioned items of income are financial institutions, the same shall be included as part of the tax base upon which the gross receipts tax is imposed.</u>" (Underscoring supplied)

Clearly, there is no doubt that the 20% final withholding tax is legally includible as part of the gross receipts for purposes of computing the gross receipts tax.

The petitioner in the instant case cited the Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, dated January 30, 1996, where this Court has upheld the petitioner's contention that the interest income included as part of such gross receipts should be computed minus the 20% final tax already withheld and deducted by various withholding agents for the reason that the amount did not go to its funds, hence, was not actually received by them. And the Court approved the petitioner's citation of Section 4(e) of Revenue Regulations No. 12-80, dated November 7, 1980, thus:

"Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities. - The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of overpayment then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder."

This Court concluded that from the aforestated provisions it can logically be inferred that the amount representing the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for purposes of computing the gross receipts tax. Such conclusion in law is legally objectionable for two (2) reasons, to wit:

1) Section 4(e) of Revenue Regulations No. 12-80 is not a computation determinative of the amount of gross receipts as basis of the gross receipts tax under Section 119 of the Tax Code. Said revenue regulations merely authorize the determination of the amount of gross receipts on the basis of the method of accounting being used by the taxpayer under Section 37 of the Tax Code. Such accounting methods for tax purposes comprise a set of rules for determining when and how to report income and deductions (**Consolidated Mines, Inc. vs. CTA, L-18843, August 29, 1974**). The two principal accounting methods expressly and impliedly recognized by the Tax Code and the Income Tax Regulations are:

(a) Cash receipts and disbursement method or cash basis. - Income earned by the taxpayer is not included in gross income until received and expenses are not deducted until paid within the taxable year; and

(b) Accrual basis. - Income is included in gross income when earned, whether received or not, and expenses are allowed as deductions when incurred although not yet paid within the year.

2) That the non-inclusion of the 20% final withholding income tax from the gross interest income for purposes of the gross receipts tax operates as an exemption from tax. Being an exemption from tax, the same must be construed strictly not against the government but against the one who asserts the claim of exemption. Tax exemption can only be given effect when the grant is clear and categorical inasmuch as taxation is the rule and exemption is the exception, Section 26, Tax Code. The holding therefore in the Asian Bank Corporation to the effect that the non-inclusion of the 20% final withholding income tax from the gross receipts can logically be inferred from the wordings of said Section 4(e) of Revenue Regulations No. 12-80, is misplaced.

Tax statutes are to receive a reasonable construction with a view to carrying out their purpose and intent (**51 Am Jur 361**). It should not be construed as to permit the taxpayer to easily evade the payment of the tax (**Cabon Steel Co. vs. Lewelyn, 251 U.S. 501**). Thus, the good faith of the taxpayer is not sufficient justification for exemption from the payment of surcharges imposed by law (**Commissioner vs. Royal Interocean Lines and CTA, L-26506, July 30, 1970**). A tax statute should be construed to avoid the possibilities of tax evasion (**Lorenzo vs. Posadas, 64 Phils. 353**).

The High Court's decision in the case of Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc. 108 Phils. 821, June 30, 1960, which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, February 27, 1965** cannot be considered as

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precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966 and Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996, for the following reasons:

> 1) In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:
>
> 87½% as dividends to holders of winning tickets
>
> 12½% as "commissions" of the Manila Jockey Club, of which ½% was assigned to the Board on Races and 5% was distributed as prizes for owners of winning horses and authorized bonus for jockeys.

According to the above-mentioned distribution of the "wager fund", the then Collector of Internal Revenue assessed the Club on the whole amount of its "commission" of 12½%. But since the Club had already paid the amusement tax based on its 7% share of the "commission", the amount assessable pertains only to the 5½% for the period from November 1946 to October 1950. On various instances, the Club protested the proposed assessments and was sustained by the opinions of the Secretary of Justice rendered on three different occasions (Opinion No. 345, series of 1941; Opinion No. 249, series of 1952 and Opinion No. 340, series of 1955).

Notwithstanding the opinions of the Secretary of Justice to the effect that the amount corresponding to the 5½% was held only by the Club in trust for the owners of winning horses and authorized bonuses of jockeys, the then Collector of Internal Revenue demanded payment of amusement taxes for the period November 1946 to October 1950. Said demand letter was timely appealed to the Court of Appeals wherein a unanimous judgment was obtained reversing the Collector's stand on the matter. In the High Court, the position of the Secretary of Justice was sustained thereby upholding the Court of Tax Appeals' decision.

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place was "especially earmarked" by law or legal rule or regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the ½%

which the law directs the club to deliver to the Board on Races. The High Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing 5½% of the 12½% "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

The above-mentioned decision of the High Court was also applied in the case of Visayan Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, Nos. L-19530 and L-19444, February 27, 1965. The legal issue involved in this case is the interpretation of the management contract entered into by and between the Bureau of Customs and Visayan Cebu Terminal Co., Inc. whereby the latter as contractor was appointed the sole manager of the Arrastre Service at the Port of Cebu City. In the said Management Contract, it was further agreed and understood that in consideration of the rights and privileges granted the Contractor for the management of the Arrastre Service, the Bureau of Customs shall receive twenty eight (28%) percent of the total monthly gross income derived from whatever source in connection with the operations of the Arrastre Service, payable within ten (10) days of the succeeding month. The main legal issue involved in this case is whether or not the gross receipts corresponding to the 28% of the total gross

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income of the Service Contractor delivered to the Bureau of Customs within ten (10) days of the following month should form part of the gross receipts subject to 3% contractor's tax under Section 191 of the Tax Code. The Court of Tax Appeals ruled in favor of the petitioner, holding the view that the said 28% payment by the Arrastre Contractor based on its monthly gross income should not form part of the gross receipts subject to 3% contractors tax and that paragraph 23 of the said Management Contract can legally be construed as a "regulation". As the learned trial court has aptly observed: "x x x the government could not have intended to consider as gross receipts the 28% that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from petitioner. To hold petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code."

All the above-mentioned decisions of the High Court made specific reference to gross receipts which are especially "earmarked by law or legal rule or regulation" as not forming part of the taxable gross receipts for purposes of the gross receipts tax under the Tax Code. For this purpose, it is pertinent to define the word "earmark" as a mark put upon a thing to distinguish it

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from another. Originally and literally, a mark upon the ear, a mode of marking sheep and other animals. Property is said to be earmarked when it can be identified or distinguished from other property of the same nature. To set apart from others (Black's Law Dictionary, 6th Edition, p. 508). In the case of the Manila Jockey Club, Inc. Executive Order No. 320 and Republic Act No. 309 made the specific "earmarking" for distribution of the total wager fund to different persons other than the proprietor. The same is true in the case of Visayan Cebu Terminal Co., Inc. where the specific earmarking of the 28% of the total monthly gross income to be delivered to the Bureau of Customs by the Contractor was provided in paragraph 23 of the Management Contract. Such specific earmarking of the twenty (20%) percent final income tax as not includible in the gross receipts for purposes of the gross receipts tax was not provided by any law or legal rule or regulations, hence the non-applicability of the above-cited High Court decisions to the Asian Bank Corporation case. This legal observation is also in point in the case of Compania Maritima case where the non-inclusion of the 10% reserve from the total cash collection to avoid claim for refund on freight and passengers tickets not taken is not provided by any law or legal rule or regulations.

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In the Asian Bank Corporation case, petitioner bank alleges that subjecting the gross receipts to the 20% final withholding income tax and later to the 5% gross receipts tax is not only oppressive and obnoxious but even a confiscatory form of double taxation. Double taxation has been defined "as the taxing of the same item or piece of property twice to the same person, or taxing it as the property of one person and again as the property of another, but this does not include the imposition of different taxes concurrently on the same property or income (e.g. federal and state income taxes), nor the taxation of the same piece of property to different persons when they hold different interests in it or when it represents different values in their hands, as when both the mortgagor and mortgagee of property are taxed in respect to their interests in it, or when a tax is laid upon the profits of the corporation and also upon the dividends paid to its stockholders" (Black's Law Dictionary, 6th Edition, p. 491). This acceptable form of double taxation is reflected in BIR Ruling No. 223 dated November 2, 1989, thus:

> "The 5% gross receipts tax under Section 120 of the Tax Code is collectible on all finance companies doing business in the Philippines from interests, discounts, and all other items treated as gross income under the Tax Code. Accordingly, your income derived

> from investing the excess funds in short-term market placements through commercial banks constitutes income hence, subject to the 5% gross receipts tax under said Section. The fact that it has been subjected to the 20% final withholding income tax under Section 50(a) is immaterial. Besides, the withholding tax is imposed under Title II of the Tax Code while the finance tax is provided under Title V thereof." (BIR Ruling No. 223, November 2, 1989)

For as long as the basis for the claim for refund or tax credit certificate is based on the non-inclusion of the amount representing the final withholding income tax under Section 50(a) as part of the gross income subject to gross receipts tax, this dissenting opinion will stand. The fact that petitioner-claimant is able to establish by competent documentary and testimonial evidence is of no moment. For purposes of the amusement tax under Section 260 of the Tax Code, the term 'gross receipts' embraces 'all the receipts' of the proprietor, lessee, or operator of the amusement place. The words 'all the receipts' refer to the total amount of cash received which becomes part of the funds of the taxpayer and does not include any money which has been specially earmarked by any law or legal rule or regulation for some other person other than the proprietor, lessee or operator of the amusement place. Receipts means actually received (Philippine Long Distance Telephone Co. vs. Collector of Internal Revenue, G.R. No. L-3222, January

21, 1952) for itself and not for others, for otherwise they would not be receipts (Manila Jockey Club, Inc. vs. Collector of Internal Revenue, CTA Case No. 205, April 15, 1958; Jai Alai Corporation of the Philippines vs. Araneta, CTA Case No. 108, July 31, 1956 (Annotated, NIRC by Commissioner Jose Arañas, 1988 Edition, p. 687).

IN VIEW OF ALL THE FOREGOING, I vote to deny the entire claim for refund not because of insufficiency of evidence but due to a lack of legal basis.

AMANCIO Q. SAGA
Associate Judge